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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 116

JOSEPH E. LIFSCHUTZ, M. D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO, Respondent

*On Petition for a Writ of Certiorari to the Supreme Court of the State of California*

## MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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## MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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The American Psychiatric Association moves this Honorable Court for leave to file a Brief in this case as Amicus Curiae. The consent of the attorney for the Petitioner herein has been obtained but the attorneys for the Respondents herein refuse to consent to the filing of a Brief by the American Psychiatric Association as Amicus Curiae. The

applicant, American Psychiatric Association, has an interest in this case in that the questions involved concern the conduct of the practice of the profession of psychiatry nationwide and affect the practice of psychiatry by the more than seventeen thousand qualified Doctors of Medicine who are members of the American Psychiatric Association and who specialize as Psychiatrists in the diagnoses, treatment and care of mental illnesses. The petition and the pleadings filed by Petitioner herein and in the court below argue the appropriateness and the legality of the Judgment of the Supreme Court of California entered in the proceedings below on March 5, 1969, in that court. That Judgment denied Petitioner's request for a writ of prohibition directed to the respondent court. Petitioner's demands for hearings concerning the constitutionality of the California statute involved were denied without opinions.

The orders below require Petitioner, a Psychiatrist, to reveal intimate personal confidences involved in the treatment of an emotionally disturbed patient, under the automatic waiver provisions of the California evidentiary statute in a civil action for injuries filed by the patient. Under the statute the filing by the patient of the civil action, without more, automatically terminates the privilege. Petitioner under pain of contempt will be forced to breach the confidence contrary to his professional ethics and his Hippocratic oath as a physician. Psychiatry as a whole views with alarm such automatic compulsory breach of the personal confidence privilege underlying psychiatric treatment which disregards the interests of society. Society will be better served if psychiatrists are able to assure their patients that their confidences are inviolate.

## CONCISE STATEMENT OF THE NATURE OF APPLICANT'S INTEREST

The American Psychiatric Association, founded in 1844, is a national membership organization of Doctors of Medicine, i.e. Psychiatrists, who specialize in the diagnoses, treatment and care of mental illnesses. The Association is

comprised of more than seventeen thousand qualified Doctors of Medicine who specialize as Psychiatrists. Various aspects of Federal and State laws pertaining to the nature of the privilege and the extent of the confidentiality affording or restricting the degree and quality of privilege and confidentiality involved in the highly specialized practice of psychiatry, which differs considerably from the ordinary practice of medicine, have caused grave concern to the American Psychiatric Association and its thousands of member Psychiatrists. The practice of psychiatry transcends State lines and the privilege and confidentiality regarding Psychiatrists' records, findings and diagnoses should be covered and protected by a quality as high as that afforded to attorneys at law and clergymen. State statutes, like the California statute, which arbitrarily waive both the privilege and confidentiality, where Psychiatrists are involved in the diagnoses, treatment and care of the mentally ill on the mere filing of a civil action for damages for personal injuries, pose questions of great concern to the American Psychiatric Association and its thousands of Psychiatric members. These members practice nationwide and their practices are not restricted to any given State in the treatment of mentally ill patients.

Underlying the treatment given by a Psychiatrist to a mentally ill patient is the expressed or inferred binding understanding and agreement that the highly personal disclosures freely made by the patient and necessary to appropriate psychiatric diagnoses and treatment, are to be held in the utmost confidence and are not to be divulged. To permit this confidence to be breached on the mere basis of the filing of a civil action would decrease the capabilities of Psychiatrists to make accurate diagnoses and to provide for adequate and proper medical psychiatric treatments. Involved also in this confidential situation is the problem inherent in psychiatry which arises when the patient makes such disclosures to a Psychiatrist in good faith, with the belief, understanding or agreement that they will be kept confidential but are later compelled to be divulged, by force

of statute alone by testimony of the Psychiatrist. The problem, in effect, is unreasonable and results in compelling a patient to testify against himself without prior knowledge of the problems and dangers involved in his free disclosures made during treatment to his Psychiatrist in "inviolate" confidence.

Treatment of the mentally ill is too important (the assurance of confidentiality is central to this treatment) to risk jeopardizing the whole theory and success of treatment because of the possible but questioned relevance of some of the patient's personal statements in a later civil proceeding. Also involved, as opposition to legal compulsion, are the deep-rooted ethics of the profession as they apply to the Psychiatrist, if he is forced to breach the basic and inviolate confidentiality existing between the psychiatrist and his patient by a court order. Under "legal" compulsion he may find himself acting contrary to his ethics and his Hippocratic Oath[1] which could subject him to severe criticism by his peer group or by the community. Undue and unnecessary publicity usually follows personal disclosures of a patient. Such publicity tends to undermine public confidence in the Psychiatrist and jeopardizes the treatment value of the Psychiatrist. The possibilities of opening fantasy projections and endogenous hostility or aggression to individuals or to the public could cause serious misinterpretations of the personality, ego drives and behavior of individuals who could be normal. Such automatic forced disclosures with the resulting situations which arise therefrom could cause many persons who would otherwise seek needed psychiatric help for emotional problems to be reluctant to seek this needed learned professional medical assistance. Other serious and grave problems are involved in the

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[1] The Hippocratic Oath, which is still administered to medical graduates, states: ". . . Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret . . ."

type of waiver provided by the California statute which adversely affect the American Psychiatric Association and its thousands of practicing psychiatric members and the public, i.e., their patients.

## QUESTIONS OF LAW INVOLVED

Serious constitutional problems are involved in the actions taken by the courts below in denying any relief and in dismissing Petitioner's actions, which attacked the California statute, all without opinions, and without the taking of any evidence. Grave questions reaching constitutional levels arise from the enforcement of the automatic waiver provisions of the California statute, requiring the Psychiatrist, on the mere filing of a civil action, to reveal the most intimate confidential disclosures made to him by his mentally or emotionally disturbed patient, contrary to the phychiatrist's practice, deeply imbedded ethics, his Hippocratic Oath and the public interests.

Petitioner points out (Pet. p. 9) that the California Law Review Commission in developing precise evidential provisions for the California Code, recommended that privilege for psychiatrists, particularly those engaged in psycotheraphy, because their treatment requires the fullest revelation of the most intimate and embarrassing details of the patient's life, should have a much broader privilege that that involved in the ordinary physician-patient privilege. In recommending that legislation should keep such confidential information "in utmost confidence," the Commission concluded (Pet. p. 9):

> "A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclo-

sure upon which diagnosis and treatment or complete and accurate research depends.

The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. *Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.*" (Emphasis supplied).

However, the California legislature in its code of evidence enacted automatic waiver provisions which completely disregard the interests of society in the preservation of the confidence existing between psychiatrists and patients.

The statute in question provides for automatic waiver of privilege when a patient sues for damages involving mental or emotional conditions (Secs. 996 and 1016, Appendix pp. 11, 12).

These automatic provisions disregard the public interest as no hearing is authorized, no testimony is to be taken and no order is to be entered by a court of competent jurisdiction weighing the public interest against the production of "relevant information" which in effect is an unreasonable search and seizure and the compelling of the patient to be a witness against himself.

In *Boyd v. United States,* 116 U.S. 16, 6 S.Ct. Rep. 524 (1886), an evidentiary statute of the United States (Sec. 5 of the Act of June 22, 1874, 18 Stat. 187), provided when any claimant sought to recover forfeited goods held by the

United States for alleged violations of law, that the United States could serve a Motion on the claimant for the production of any books, invoices or papers relating to the allegations of the claimant and that such papers when produced by order of the court could be offered in evidence on behalf of the United States. The scheme of this Federal statute is quite similar to the scheme of the California statute and related only to non-criminal suits and proceedings.

In *Boyd* an order was issued relating to an invoice concerning the property involved, which invoice was produced and placed in evidence by the United States. The judgment in favor of the United States in *Boyd* was reversed because the Act violated the constitutional provisions of the Fourth and Fifth Amendments.

The Court stated the principal question in *Boyd* to be as follows:

> "Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him * * *."

In answering this question, after a review of the decisions the Supreme Court held in a civil case which had commenced as proceedings in rem for a forfeiture of personal property, in which the claimant filed a claim for the goods being forfeited, that the provisions for compulsory production of the claimant's papers violated the Fourth and Fifth Amendments of the Constitution and said (p. 536):

> "We find nothing in the decisions to change our views in relation to the principal question at issue. We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

The inapt provisions of the California statute, not even requiring a court order, are unconstitutional, in that they destroy the public interest in the privilege and confidence necessary to the practice of psychiatry in the treatment of the patient.

The privilege and confidence involved in psychiatry should be held to be on a par and equal to that involved in law and and theology. We post the question of whether a statute requiring lawyers and confessional priests particularly to reveal confidences of clients and parishioners where civil actions are filed and without more, could withstand constitutional attacks. We doubt it. We state that a similar question is present here adversely involving the only other *learned* profession, the practice of medicine, the American Psychiatric Association and its thousands of member psychiatrists and the interested public, that is, the thousands upon thousands of mentally ill and emotionally disturbed patients whom the Psychiatrists treat now in strict and inviolate confidence.

The arguments presented by Petitioner herein are inadequate. While they speak for the Petitioner and his patients they do not speak effectively for the American Psychiatric Association and the more than seventeen thousand member Psychiatrists whose unique and highly specialized practices and their patients' treatment are involved in the application of the arbitrary waiver provisions of the California statute. The Applicant seeks leave to expand the present arguments made by the Petitioner in order that this Court might have a more complete presentation and understanding of the grave and important constitutional questions and problems arising under the California waiver statute involving psychiatry as a whole. If the arguments which will be presented more in detail concerning the mental health field in the applicant's Amicus Curiae Brief are approved by this Court

then the judgment of the court below should be reversed in the public interest.

Respectfully submitted,

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